



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
2 NAVY ANNEX
WASHINGTON, D.C. 20370-5100

BJG
Docket No: 6319-98
6 October 2000

From: Chairman, Board for Correction of Naval Records
To: Secretary of the Navy

Subj: MAJ [REDACTED], USMC, [REDACTED]
REVIEW OF NAVAL RECORD

Ref: (a) Title 10 U.S.C. 1552

Encl: (1) DD Form 149 dtd 2 Jun 98 w/attachments,
incl repts of JAGMAN investigation and Art 32 hearing
(2) Memo for record dtd 26 May 00
(3) HQMC PERB memo dtd 21 Aug 98
(4) Subject's ltr dtd 14 Nov 98
(5) Subject's ltr dtd 15 Jun 99 w/encls
(6) RS ltr dtd 30 Jul 99
(7) Subject's ltr dtd 8 Sep 99
(8) RS ltr dtd 19 Jun 00
(9) RS ltr dtd 8 Sep 00
(10) Memo for record dtd 25 Sep 00
(11) Memo for record dtd 26 Sep 00
(12) Memo for record dtd 27 Sep 00
(13) Subject's naval record

1. Pursuant to the provisions of reference (a), Subject, hereinafter referred to as Petitioner, filed written application, enclosure (1), with this Board requesting, in effect, that his naval record be corrected by removing the fitness report for 1 November 1994 to 2 June 1995. A copy of this report is at Tab A to enclosure (1). The memorandum for the record at enclosure (2) shows he later amended his application to request that the fitness report at issue not be removed completely, but modified by removing all derogatory material.

2. The Board, consisting of Messrs. Leeman and Pfeiffer and Ms. Newman, first reviewed Petitioner's case on 20 October 1999. They made no decision, but directed that the reporting senior (RS) who submitted the contested fitness report be asked to comment on a letter from the third sighting officer (paragraph 3.k below refers); and specify what the RS had alleged to be "failings" by Petitioner which had resulted in a Marine's death. They completed their review of Petitioner's allegations of error and injustice on 4 October 2000. Pursuant to the Board's regulations, they determined that the corrective action indicated below should be taken on the available evidence of record. Documentary material considered by the Board consisted of the enclosures, naval records, and applicable statutes, regulations and policies.

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice, finds as follows:

a. Before applying to this Board, Petitioner exhausted all administrative remedies which were available under existing law and regulations within the Department of the Navy.

b. Enclosure (1) was filed in a timely manner.

c. Petitioner, an infantry officer, served as a rifle company commander during the period of the contested fitness report. On 3 May 1995, in the course of a live fire exercise, a private first class (PFC) under his command was shot and killed. A Judge Advocate General (JAG) Manual investigation of the death was conducted. The report of the JAG Manual investigation (at enclosure (1)) was submitted on 24 May 1995. On 2 June 1995, Petitioner's RS/battalion commander submitted the report at issue, documenting that he had relieved Petitioner for cause. On 19 March 1996, criminal charges arising out of the PFC's death were preferred against Petitioner. After a hearing under Article 32, Uniform Code of Military Justice (UCMJ) conducted on 29 May and 8 July 1996 (report at enclosure (1)), Petitioner was tried by a general court-martial (GCM) on the following charges: dereliction of duty, manslaughter, and unlawfully killing the PFC by negligently failing to properly supervise the coordination and emplacement of fighting and firing positions. On 8 August 1996, he was acquitted of all charges (Tab B to enclosure (1)).

d. The contested fitness report evaluated Petitioner's performance in his current grade of captain. It showed his primary duty as "company commander." He was marked "OS" (outstanding), the highest possible, in all graded areas, except item 13a ("regular duties"), where he was marked "AA" (above average), the third highest; and items 13g ("tactical handling of troops"), 14d ("attention to duty") and 14g ("judgment"), where he was marked "UN" (unsatisfactory), the lowest possible. The RS gave Petitioner the highest possible mark in item 16, indicating he would "particularly desire" Petitioner for service in war; and in item 19, he indicated Petitioner was qualified for promotion. In item 15 ("general value to the service"), Petitioner was rated "OS," and he was ranked second among the six captains so marked. The RS's comments in section C were favorable, except the following:

As a result of my loss of trust and confidence in [Petitioner] as a rifle company commander, he is relieved for cause. This action is necessary because of his unsatisfactory attention to duty, failure to supervise properly, and errors in judgment. These failings occurred [sic] during a singular tactical maneuver (CAX [Combined Arms Exercise] 5/6-95) and resulted in the death of a Marine...

Initiative is his best and worst quality...

Relishes freedom and independent action...sometimes not in sync with my intent. I am confident that this officer has learned his lesson--though at a

significant cost--and can continue to provide valuable service to the Marine Corps.

e. As the report was adverse in both marks and comments, Petitioner completed item 24, indicating that he had attached a statement to the report; and the report was reviewed by a third sighting officer. In his three-page statement, with the report at Tab A to enclosure (1), Petitioner said he would "always bear moral responsibility for that tragic incident," but that the marks and comments were "unwarranted" and "factually incorrect." He noted that the incident was currently the subject of an Article 32 investigation not yet completed, and that the JAG Manual investigation which had been completed did not recommend that he be relieved. He stated that after the incident, his RS, with the concurrence of the regimental commander/reviewing officer (RO), assigned him as the battalion S-3 officer, which indicated to Petitioner that his RS had not lost confidence in him. He argued that his RS judged him before all the facts were known. Regarding the RS's comment that Petitioner was sometimes not in sync with the RS's intent, he stated that the RS never articulated his long-term vision for the battalion. He said the Marines of his company were "Outraged" about his relief; and he asked that the RO interview them regarding Petitioner's performance and leadership before allowing the fitness report at issue to proceed. Finally, he said he felt the report was "more a vindictive statement and less an honest appraisal."

f. The RO submitted a three-page statement, also at Tab A to enclosure (1). The first two sentences of the RO's comments were as follows:

The Reporting Senior's report is fair and accurately portrays [Petitioner's] performance and outstanding potential. I specifically concur with his strengths as noted by the Reporting Senior (the Battalion Commander).

The RO stated that the RS's confidence in Petitioner was not easily shaken, but after completion of the JAG Manual investigation, Petitioner lost the RS's trust and confidence. The RO said that to the RS's credit, he did not immediately relieve Petitioner for cause, but waited until after his confidence in Petitioner had been eroded by what he had read in the JAG Manual investigation. The RO stated that Petitioner had many positive character traits, but that his relief for cause "is the result of his being held appropriately accountable for the loss of his Marine." The RO agreed that Petitioner was correct that the investigation did not recommend his relief, but that the RS was within his authority in relieving him after having reviewed the investigation. The RO stated that even if Petitioner's Marines were "Outraged," suitability for command is not determined by subordinates. The RO disagreed with Petitioner's contention that the RS's vision was not well published or articulated. The RO said he found no vindictiveness in the report, nor any merit in Petitioner's allegations of inconsistencies. Finally, he stated he had not referred his comments to Petitioner for rebuttal, because he had introduced no adverse material.

g. The third sighting officer, a major general at the time he reviewed the contested report, initialed it without comment.

h. Petitioner's application contended that the contested fitness report is unjust, as it was written, in violation of the applicable Marine Corps fitness report order, before the investigative process had been completed; and the GCM ultimately acquitted him of all charges. He further contended that although he was promoted to major after having received the report, it is unfairly prejudicial to his character and record.

i. Enclosure (3) is the report of the Headquarters Marine Corps (HQMC) Performance Evaluation Review Board (PERB) in Petitioner's case. The report reflects the PERB decision to deny relief. The PERB report includes the following:

3...a. When there is a serious injury or death resulting from a training or operational incident, paragraph 0209 of the Manual of the Judge Advocate General requires the appropriate command to conduct a command investigation [emphasis in original]. The purpose is to gather, analyze, and record relevant information. In essence, it is a fact-finding inquiry. It is evident that the facts uncovered by the Investigating Officer led the [RS] to act as he did, with the full concurrence of the Regimental Commander. It is clear that the petitioner was not relieved for cause until the results of the investigation (JAG) were completed and seen by the [RS]. The ultimate basis of the [RS's] loss of trust and confidence in the petitioner, and subsequent relief for cause, was an uncontroverted fact of vastly negative proportions (i.e., the death of a Marine under the petitioner's command).

b. The subsequent Article 32 investigation was to determine if there was a basis for criminal charges under the [UCMJ]. The petitioner implies the JAG [Manual] investigation and the Article 32 investigation are mutually interdependent. They are not. The resulting [GCM] of 22 July 1996 determined the elements of the offenses were not sufficiently provable to find the petitioner guilty of any criminal action. However, the [PERB] is hasty [sic] to point out that a "not guilty" verdict from a [GCM] does not somehow negate a commander from being held responsible and liable, as a leader, by his superiors, for the actions of his command. Simply stated, poor judgment is not a criminal offense.

c. Other than documenting his [GCM] Results of Trial, the petitioner offers no evidence not surfaced in his rebuttal and thoroughly answered/adjudicated by [the RO]...

j. Enclosure (4) is Petitioner's initial response to the HQMC PERB report. He stated FBI tests showed that a .50 caliber machine gun killed the PFC; and that the heavy machine gun (HMG) platoon, a unit not attached to any company in his battalion, was under the tactical control of the HMG platoon commander. He gave his opinion that his acquittal by the GCM had been based on evidence that the machine gun that hit the PFC had fired outside its safe sector; and he further felt it was the HMG platoon commander who should have been

held responsible for the death. He questioned whether his relief for cause was justified at the time, or appropriate to be included in his fitness report. He argued that the report was internally inconsistent; and that the RO remarks did, in fact, include new adverse material warranting referral to him.

k. Enclosure (5) is Petitioner's further reply to the PERB report. He reiterated his contention that the RS violated the applicable Marine Corps fitness report order by preparing the fitness report at issue while the incident was still under investigation. He said that his fitness reports before and after the report in question show continuing confidence in all areas of performance. He alleged that the report was based on a "very preliminary" JAG Manual investigation which implicitly made the false assumption that a 7.62 or 5.56 mm round from a weapon under Petitioner's control killed the PFC. He enclosed a copy of an FBI ballistics report which determined that a .50 caliber machine gun, a weapon not under Petitioner's control, killed the PFC. He also enclosed a letter from the officer, now a lieutenant general, who had acted as the third sighting officer on the contested report, supporting removal of the fitness report at issue. The general stated that he believed "the facts that surfaced during the investigation and trial were substantially different than the assumptions upon which this fitness report was based." Given the findings of the FBI ballistics report, the general concluded that the report in question should be removed because it is "unfairly prejudicial."

l. Before this Board began its review of Petitioner's case, the Board's staff forwarded the FBI ballistics report to the RS and asked him to comment on whether it changed his opinion on the appropriateness of the contested fitness report. In the RS's reply at enclosure (6), he stated that Petitioner had contacted him during March and April 1999 and requested support in getting the fitness report removed. The RS said he had declined the request, but told Petitioner he would answer any questions this Board might have. He stated Petitioner is correct that he was unaware of the FBI ballistics report when he submitted the report in question; however, he added that even if he had been aware of the report, he still would have relieved Petitioner for cause and given him an adverse fitness report on the basis of "his personal failure to perform his duties that ultimately resulted in the death of a Marine."

m. Enclosure (7) is Petitioner's response to the RS's letter at enclosure (6). He stated that his RS did not have all the "vital and relevant information" when he signed the contested fitness report: that a .50 caliber machine gun round killed the PFC; that the HMG platoon was not under his tactical control; that the HMG platoon was under the tactical control of the HMG platoon commander; and that the HMG platoon was operating in his company's area.

n. In accordance with the Board's direction, the RS was given the third sighting officer's letter and asked if it changed his position. The RS's reply at enclosure (8) stated that he did not want to contradict the third sighting officer, however, his "opinion remains that [Petitioner's] actions warranted the adverse fitness report."

o. As further directed by the Board, the RS was asked to specify what he had alleged to be "failings" by Petitioner which resulted in the death of a Marine. The RS's response at

o. As further directed by the Board, the RS was asked to specify what he had alleged to be "failings" by Petitioner which resulted in the death of a Marine. The RS's response at enclosure (9) stated he now supports removing the contested fitness report. He noted that following Petitioner's relief for cause, Petitioner became the subject of a JAG Manual investigation, an Article 32 hearing, and a GCM. He further noted that through this process, Petitioner was found not guilty and was not held criminally responsible for the accident which resulted in the Marine's death. He stated that "Had the incident resulting in the death of a Marine not occurred, [he] would have written [Petitioner] a report in line with those reported [sic] [he] had previously written." Finally, he said that after the incident, through the entire legal process and in later assignments, Petitioner had continued to perform well; and that he had demonstrated the potential for further service.

p. The memorandum for the record at enclosure (10) documents that the Board's staff read to the chairperson of the HQMC PERB the letters from the RS and third sighting officer supporting removal of the contested fitness report, both of which had been received after the PERB had considered Petitioner's case; but the chairperson determined that the PERB would not reconsider.

q. The memorandum for the record at enclosure (11) verifies that the chairperson of the HQMC PERB had talked with the RO, and that he had told her the following: that he was unaware of any new facts in Petitioner's case that would warrant removing the report in question; that he had discussed Petitioner's situation with the RS; and that the RS had stated he was now supporting Petitioner because he believed that the incident should not be allowed to ruin his career.

r. The memorandum for the record at enclosure (12) documents that Petitioner was made aware of the RO input reflected in enclosure (11), but had no comment.

CONCLUSION:

Upon review and consideration of all the evidence of record, and notwithstanding the contents of enclosures (3) and (11), the Board finds the existence of an injustice warranting the requested modification of the fitness report at issue.

The Board particularly notes that the RS and third sighting officer both support removing the report. They further note that Petitioner was acquitted of all charges at the GCM, a fact that was not known to the RS when he submitted the report. Finally, they find that the report is internally inconsistent, especially in that it relieves Petitioner for cause while assigning him the highest possible mark in "general value to the service." They find that removing all the derogatory material, as he requested, will remove the inconsistency.

In view of the above, the Board recommends the following corrective action:

RECOMMENDATION:

a. That Petitioner's naval record be corrected by making the following changes to the fitness report for 1 November 1994 to 2 June 1995, signed by Lieutenant ~~XXXXXXXXXX~~, USMC, and dated 2 June 1995, leaving the report so amended in his record:

(1) Change from "UN" to "NO" (not observed) the marks in items 13g ("tactical handling of troops"), 14d ("attention to duty") and 14g ("judgment").

(2) Modify the RS's comments in section C as follows:

(a) Remove the entire first paragraph, which reads as follows:

As a result of my loss of trust and confidence in [Petitioner] as a rifle company commander, he is relieved for cause. This action is necessary because of his unsatisfactory attention to duty, failure to supervise properly, and errors in judgment. These failings occurred during a singular tactical maneuver (CAX 5/6-95) and resulted in the death of a Marine.

(b) Delete the words "and worst" from the sentence "Initiative is his best and worst quality," so that the sentence as corrected will read as follows: "Initiative is his best quality."

(c) Delete "...sometimes not in sync with my intent," so that the sentence in which this appears will read as follows: "Relishes freedom and independent action."

(d) Delete the following sentence: "I am confident that this officer has learned his lesson--though at a significant cost--and can continue to provide valuable service to the Marine Corps."

(3) Delete all entries from item 24.

(4) Modify the RO's certification, "Remarks," by deleting the letter "S" from the word "PAGES," so that the corrected entry will read as follows: "REVO [RO] CERTIFICATION REFER TO ADDENDUM PAGE."

(5) Remove the three standard addendum pages reflecting Petitioner's statement.

(6) Modify as follows the Fitness Report Standard Addendum Page reflecting page 1 of the continuation of the RO's certification:

(a) Block 5: Change "Pg 1 of 3" to "Pg 1 of 1"; and remove all comments except the first two sentences, so that the comments as corrected will read as follows:

The Reporting Senior's report is fair and accurately portrays [Petitioner's] performance and outstanding potential. I specifically concur with his strengths as noted by the Reporting Senior (the Battalion Commander).

(b) Block 7 ("General/Senior Officer Sighting"): Delete all entries.

(7) Remove the Fitness Report Standard Addendum Pages reflecting pages 2 and 3 of the continuation of the RO's certification.

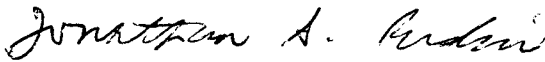
b. That the magnetic tape maintained by Headquarters Marine Corps be corrected accordingly.

c. That any material or entries inconsistent with or relating to the Board's recommendation be corrected, removed or completely expunged from Petitioner's record and that no such entries or material be added to the record in the future.

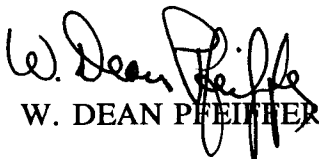
d. That any material directed to be removed from Petitioner's naval record be returned to this Board, together with a copy of this Report of Proceedings, for retention in a confidential file maintained for such purpose, with no cross reference being made a part of Petitioner's naval record.

4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.


ROBERT D. ZSALMAN
Recorder


JONATHAN S. RUSKIN
Acting Recorder

5. The foregoing report of the Board is submitted for your review and action.


W. DEAN PFEIFFER

Reviewed and approved:

 10-11-00
Carolyn H. BeCraft
Asst Secretary of the Navy
(Manpower & Reserve Affairs)



DEPARTMENT OF THE NAVY
HEADQUARTERS UNITED STATES MARINE CORPS
2 NAVY ANNEX
WASHINGTON, D.C. 20380-1775

6319-98

IN REPLY REFER TO:
1610
MMER/PERB

AUG 21 1998

MEMORANDUM FOR THE EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF
NAVAL RECORDS

Subj: MARINE CORPS PERFORMANCE EVALUATION REVIEW BOARD (PERB)
ADVISORY OPINION ON BCNR APPLICATION IN THE CASE OF MAJOR
[REDACTED] USMC

Ref: (a) [REDACTED]'s DD Form 149 of 2 Jun 98
(b) MCO P1610.7D

1. Per MCO 1610.11B, the Performance Evaluation Review Board, with three members present, met on 20 August 1998 to consider [REDACTED]'s petition contained in reference (a). Removal of the fitness report for the period 941101 to 950602 (CD) was requested. Reference (b) is the performance evaluation directive governing submission of the report.

2. The petitioner believes that since the fitness report was written at the beginning of an investigative process, and while action was still pending, the overall evaluation is unjust and in violation of subparagraph 4007.4e(1) of reference (b) concerning unacceptable comments. He states he was subsequently found innocent of all charges at a General Court-Martial and promoted to his current grade; that the continuing presence of the report is unfairly prejudicial to his character and record. To support his appeal, the petitioner furnishes a copy of the Statement of Acquittal.

3. In its proceedings, the PERB concluded that the report is both administratively correct and procedurally complete as written and filed. The following is offered as relevant:

a. When there is a serious injury or death resulting from a training or operational incident, paragraph 0209 of the Manual of the Judge Advocate General requires the appropriate command to conduct a command investigation. The purpose is to gather, analyze, and record relevant information. In essence, it is a fact-finding inquiry. It is evident that the facts uncovered by the Investigating Officer led the Reporting Senior to act as he did, with the full concurrence of the Regimental Commander. It is clear that the petitioner was not relieved for cause until the results of the investigation (JAG) were completed and seen by the Reporting Senior. The ultimate basis of the Reporting Senior's loss of trust and confidence in the petitioner, and subsequent

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relief for cause, was an uncontroverted fact of vastly negative proportions (i.e., the death of a Marine under the petitioner's command).

b. The subsequent Article 32 investigation was to determine if there was a basis for criminal charges under the Uniform Code of Military Justice. The petitioner implies the JAG investigation and the Article 32 investigation are mutually interdependent. They are not. The resulting General Court-Martial of 22 July 1996 determined the elements of the offenses were not sufficiently provable to find the petitioner guilty of any criminal action. However, the Board is haste to point out that a "not guilty" verdict from a General Court-Martial does not somehow negate a commander from being held responsible and liable, as a leader, by his superiors, for the actions of his command. Simply stated, poor judgment is not a criminal offense.

c. Other than documenting his General Court-Martial Results of Trial, the petitioner offers no evidence not surfaced in his rebuttal and thoroughly answered/adjudicated by Colonel [REDACTED].

4. The Board's opinion, based on deliberation and secret ballot vote, is that the contested fitness report should remain a part of [REDACTED]'s official military record.

5. The case is forwarded for final action.

[REDACTED]
Colonel, U.S. Marine Corps
Deputy Director
Personnel Management Division
Manpower and Reserve Affairs
Department
By direction of the Commandant
of the Marine Corps



DEPARTMENT OF THE NAVY
HEADQUARTERS UNITED STATES MARINE CORPS
2 NAVY ANNEX
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6319-98

IN REPLY REFER TO:
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AUG 21 1998

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2. The petitioner believes that since the fitness report was written at the beginning of an investigative process, and while action was still pending, the overall evaluation is unjust and in violation of subparagraph 4007.4e(1) of reference (b) concerning unacceptable comments. He states he was subsequently found innocent of all charges at a General Court-Martial and promoted to his current grade; that the continuing presence of the report is unfairly prejudicial to his character and record. To support his appeal, the petitioner furnishes a copy of the Statement of Acquittal.

3. In its proceedings, the PERB concluded that the report is both administratively correct and procedurally complete as written and filed. The following is offered as relevant:

a. When there is a serious injury or death resulting from a training or operational incident, paragraph 0209 of the Manual of the Judge Advocate General requires the appropriate command to conduct a command investigation. The purpose is to gather, analyze, and record relevant information. In essence, it is a fact-finding inquiry. It is evident that the facts uncovered by the Investigating Officer led the Reporting Senior to act as he did, with the full concurrence of the Regimental Commander. It is clear that the petitioner was not relieved for cause until the results of the investigation (JAG) were completed and seen by the Reporting Senior. The ultimate basis of the Reporting Senior's loss of trust and confidence in the petitioner, and subsequent

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c. Other than documenting his General Court-Martial Results of Trial, the petitioner offers no evidence not surfaced in his rebuttal and thoroughly answered/adjudicated by Colonel [REDACTED]

4. The Board's opinion, based on deliberation and secret ballot vote, is that the contested fitness report should remain a part of [REDACTED]'s official military record.

5. The case is forwarded for final action.

[REDACTED]
Colonel, U.S. Marine Corps
Deputy Director
Personnel Management Division
Manpower and Reserve Affairs
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By direction of the Commandant
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DEPARTMENT OF THE NAVY
HEADQUARTERS UNITED STATES MARINE CORPS
2 NAVY ANNEX
WASHINGTON, D.C. 20380-1775

6319-44

IN REPLY REFER TO:
1610
MMER/PERB

AUG 21 1998

MEMORANDUM FOR THE EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF
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Colonel, U.S. Marine Corps
Deputy Director
Personnel Management Division
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By direction of the Commandant
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